Filed 7/30/19 P. v. Scott CA3

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. JOHN MICHAEL SCOTT, Defendant and Appellant.	C087718 (Super. Ct. No. 17FE005600)

After a court trial, defendant John Michael Scott was convicted of three counts of committing a lewd and lascivious act on a child under the age of 14 years. (Pen. Code, § 288, subd. (a).)[1] As to counts one and two, the trial court found true that defendant had substantial sexual contact with the victim A.D. during the commission of the offense. (§ 1203.066, subd. (a)(8).) As to count three, the court found not true that defendant had substantial sexual contact with the victim D.D. during the commission of the offense.

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[1] Undesignated statutory references are to the Penal Code.

The trial court sentenced defendant to a total term of 12 years in prison: the upper term of eight years for count one, and two years each (one-third the middle term) for counts two and three. The court found defendant ineligible for probation based on its findings of substantial sexual conduct as to counts one and two.

On appeal, defendant challenges the court's decision to allow his character witnesses to be asked whether they had heard about a molestation accusation made by a now-deceased individual, and its exclusion of part of one character witness's testimony regarding the origins of the allegation. Anticipating our conclusion that the latter argument was forfeited, defendant alternatively argues his trial counsel rendered ineffective assistance by failing to raise it in the trial court. With respect to the findings of substantial sexual conduct as to counts one and two, defendant argues there was insufficient evidence to support them, and they cannot be affirmed because they were not alleged in the accusatory pleading. We will affirm the judgment.

I. DISCUSSION

The facts underlying the convictions are for the most part not pertinent to this appeal. To the extent they are relevant, we discuss them in connection with our resolution of the issues on appeal.

A. "Have You Heard?" Questions

1. Trial Court Proceedings

Anticipating defendant would call character witnesses to opine that he is not a child molester or does not have the reputation of being one, the prosecution moved in limine to ask the witnesses "whether they have heard about the allegations involving [R.N]." Defendant filed his own motion seeking to exclude this line of questioning. He attached as an exhibit a transcript of a telephone interview with R.N's mother, L.N., by an investigator for the district attorney. In the transcript, L.N. relays that, as an adult, R.N. told her defendant had molested him as a child. L.N. and R.N. talked about it a few times: "And he said mom, 'He touched me in a lot of inappropriate ways.' He never

came out and told me, he made me do this, he made me do that or he did this to me or he did that to me." R.N. died about a year after telling his mother that defendant molested him. L.N. told the interviewer that she previously told defendant's wife, "I'm going to make sure [defendant] stays in jail. I'm doing this for my son and that's it."

At the hearing on the motions in limine, the prosecutor explained the basis for his good faith belief in the information was listening to the interview multiple times, L.N.'s description of the disclosure and the emotion with it, and the fact the disclosure predated the disclosure of the charged offenses. The prosecutor said there were no police or CPS reports concerning the R.N. allegation, and he agreed with defense counsel that L.N. was biased and angry.

The court reviewed the transcript, engaged in a balancing under Evidence Code section 352, and granted the People's motion and denied defendant's motion.

At trial, defendant called several witnesses who were asked to opine about his character in terms of how he behaves with children. They each testified favorably and indicated they never saw defendant act inappropriately toward children. In an apparent effort to preempt the prosecution, defense counsel asked each character witness if she had heard defendant had been accused of molesting R.N. Defense counsel also asked some of the witnesses if hearing that accusation would or did change the witness's opinion of how defendant behaves around children. Each witness who was asked said it would not or did not.

The trial court instructed itself that "[t]hese 'have you heard' questions and their answers are not evidence that the defendant engaged in any such conduct. You may consider these questions and answers only to evaluate the meaning and importance of a character witness's testimony." (See *People v. Hempstead* (1983) 148 Cal.App.3d 949, 954 (*Hempstead*) ["When such cross-examination of a good-character witness is permitted, the jury should be instructed that such questions and answers of a character

witness are to be considered only for the purpose of determining the weight to be given to the opinion or testimony of the witness"].)

2. Hearsay Rules and Good Faith Requirement

Evidence Code section 1101 generally excludes evidence of character or a trait of character to prove a person's conduct on a specified occasion. (Evid. Code, § 1101, subd. (a).) However, a defendant may introduce "evidence of the defendant's character or a trait of his character in the form of an opinion or evidence of his reputation" in order to "prove his conduct in conformity with such character or trait of character." (Evid. Code, 1102, subd. (a).) As he concedes, defendant did so here.

By doing so, defendant "open[ed] the door to the prosecution's introduction of hearsay evidence that undermine[d] testimony of his good reputation or of character inconsistent with the charged offense." (*People v. Tuggles* (2009) 179 Cal.App.4th 339, 357 (*Tuggles*); see Evid. Code, § 1102, subd. (b) [prosecution may offer "evidence of the defendant's character or a trait of his character in the form of an opinion or evidence of his reputation" to rebut evidence introduced by defendant under Evidence Code section 1102, subdivision (a)].) As relevant to the issues raised by this appeal, "[t]he prosecution may explore opinion-based hearsay by asking whether the witness has heard of statements at odds with the asserted good character or reputation. 'The rationale allowing the prosecution to ask such questions (in a "have you heard" form) is that they test the witness'[s] knowledge of the defendant's reputation.' " (*Tuggles, supra,* at p. 358.) "A good faith belief by the prosecution that the acts or statements asked about actually happened suffices to allow questioning of the witness about their occurrence." (*Ibid.*)

Defendant argues the trial court erred in permitting inadmissible, untrustworthy, hearsay evidence to rebut the evidence of his good character. We disagree. The questions posed were asked in the form of a "have you heard" inquiry as authorized by case law. (*People v. Clair* (1992) 2 Cal.4th 629, 684.) As this court has previously explained, such questions do not elicit hearsay because they are not offered for the truth

of the assertion, but to test the reliability of the character witness's testimony. (*Tuggles, supra,* 179 Cal.App.4th at p. 358; cf. *Clair, supra*, at p. 684 ["the inquiry did not purport to introduce such evidence and in fact did not do so"].) While defendant's witnesses ostensibly testified to his character rather than his reputation, in such circumstances it is still appropriate for the prosecution to test the character witness's knowledge, including her knowledge of well-founded rumors of misconduct inconsistent with the character traits to which she testified. (*Hempstead, supra,* 148 Cal.App.3d at p. 954; *People v. Hurd* (1970) 5 Cal.App.3d 865, 879-880, superseded by statute on another ground as stated in *People v. Tobias* (2001) 25 Cal.4th 327, 332.) Whether defendant's character witnesses were aware of R.N.'s allegation was relevant to whether they were knowledgeable enough to opine meaningfully regarding defendant's character. Accordingly, the court instructed itself that "[t]hese 'have you heard' questions and their answers are not evidence that the defendant engaged in any such conduct. You may consider these questions and answers only to evaluate the meaning and importance of a character witness's testimony." The court also instructed itself that the attorneys' "questions are not evidence" We presume the trier of fact follows the instructions. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) Defendant's hearsay arguments are without merit.

We also reject defendant's contention that "it cannot be reasonably concluded that the prosecutor held a good faith belief" that defendant molested R.N.[2] The prosecutor

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[2] It is not clear the prosecutor needed a good faith belief the molestation occurred, so long as he had a good faith belief the allegation he asked about occurred. (*Tuggles, supra,* 179 Cal.App.4th at p. 358 ["A good faith belief by the prosecution that the acts or *statements* asked about actually happened suffices to allow questioning of the witness about their occurrence," italics added]; but see *Michelson v. U.S.* (1948) 335 U.S. 469, 481, fn. 18 ["The relevant information that it is permissible to lay before the jury is talk or conversation about the defendant's being arrested. That is admissible whether or not

listened to L.N.'s interview several times, and concluded the disclosure was accurate based on its timing, circumstances, and emotion. The fact no formal report was made is not dispositive. A character witness may be properly cross-examined concerning familiarity with allegations and rumors. (*People v. Clair, supra*, 2 Cal.4th at p. 684.) Defendant's assertion that R.N.'s allegation may have been of a simple battery as opposed to sexual touching by defendant are disingenuous. The transcript is clear. L.N. said her son told her defendant molested him. The statement, " '[h]e touched me in a lot of inappropriate ways' " must be read in this context. The "have you heard" questions authorized by the court were neither groundless nor based in fantasy on the part of the prosecutor. (*People v. Wrigley* (1968) 69 Cal.2d 149, 167.) Accordingly, it was not an abuse of discretion for the trial court to permit this line of questioning. (*Ibid*.) We reject defendant's related constitutional claims as well. (See *Clair, supra*, at p. 685, fn. 13 ["the ruling did not substantially implicate any of these guarant[e]es"].)

3. Evidence Code Section 352

Defendant contends that even if the evidence was not hearsay or otherwise admissible, it should have been excluded under Evidence Code section 352. Again, the questions were not evidence. Nonetheless, if allowing "have you heard" "questions and answers would create a substantial danger of undue prejudice to the defendant, the trial judge has the discretion to preclude them under Evidence Code section 352." (*Hempstead, supra,* 148 Cal.App.3d at p. 954.)[3]

The "have you heard" questions were relevant to testing the knowledge of the character witnesses and the value and weight to be afforded their opinions. (*Hempstead,*

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an actual arrest had taken place; it might even be more significant of repute if his neighbors were ready to arrest him in rumor when the authorities were not in fact"].)

[3] Evidence may be excluded "if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.)

supra, 148 Cal.App.3d at p. 954.) That the court heard R.N. had made an allegation was not unduly prejudicial. The questions contained no additional or salacious detail, and the allegation was stated as such rather than as a fact. Again, we reject defendant's assertion that we do not know if the allegation involved sexual touching. Additionally, the trial court considered the argument that L.N. was untrustworthy, and we cannot conclude she was inherently so. Simply put, the court did not abuse its discretion in permitting the questioning.

B. Objections to Testimony Regarding Allegation by R.N.

On appeal, defendant argues for the first time that the trial court erred when it excluded part of the testimony of his best friend and former girlfriend regarding R.N.'s accusation.

1. Trial Court Proceedings

Defense counsel: "Q. Have you heard that [defendant] had been accused of molesting a young boy named [R.N.] when . . . [R.N.]'s mother, [L.N.,] was dating [defendant]? [¶] Have you heard that accusation?

"A. Yes.

"Q. Do you know anything about that accusation?

"A. I know it's baloney. [L.N.] --

"Q. Let me stop you. [¶] Do you know who [L.N.] is?

"A. Yes.

"Q. How do you know her?

"A. She is an ex-girlfriend of [defendant]'s.

"Q. And do you have any information regarding this accusation that he allegedly molested a man named [R.N.]?

"A. Yes.

"Q. What do you know?

"A. [L.N.] told me that she would see [defendant] rot, the way he left her in jail. It didn't matter to her what it cost. [¶] Now, when [R.N.] got out of jail --."

"[Prosecutor]: Objection. Hearsay, relevance, motion to strike.

"THE COURT: Sustained. Motion granted."

2. Forfeiture

As a threshold matter, the parties dispute what portion of the testimony was objected to and stricken. Defendant asserts the only conclusion supported by the record is that the ruling excluded the entire answer that preceded the prosecutor's objection.[4] The People argue that because the trial court was aware of L.N.'s bias against defendant from the motions in limine, it can reasonably be inferred that the prosecution objected to the reference to R.N. being in jail, and this was the portion of the testimony that was stricken. Defendant does not dispute that R.N.'s jail status was irrelevant and subject to objection. We conclude a reasonable interpretation of the record is that the prosecution was objecting to the admittedly irrelevant narrative about R.N.'s time in prison that the witness was beginning to introduce.[5] As such, it appears we must find defendant's claim is without merit.

Regardless, defendant has forfeited any claim that the trial court erred in excluding certain aspects of his friend's testimony because it was not hearsay or was subject to a hearsay exemption. "[T]he proponent of evidence must identify the specific ground of

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[4] On reply, defendant argues that if we find the trial court's ruling is less than clear, we should find his counsel's performance was deficient in failing to seek clarification. (ARB 21) This argument has been waived. (See *People v. Baniqued* (2000) 85 Cal.App.4th 13, 29 ["Withholding a point until the reply brief deprives the respondent of an opportunity to answer it . . . . Hence, a point raised for the first time therein is deemed waived and will not be considered, unless good reason is shown for failure to present it before"].)

[5] Later, the trial court sustained another objection by the prosecution to a comment about R.N. being in prison and granted a motion to strike that comment.

admissibility at trial or forfeit that basis of admissibility on appeal." (*People v. Ervine* (2009) 47 Cal.4th 745, 783; see also Evid. Code, § 354, subd. (a).) "An offer of proof should give the trial court an opportunity to change or clarify its ruling and in the event of appeal would provide the reviewing court with the means of determining error and assessing prejudice." (*People v. Schmies* (1996) 44 Cal.App.4th 38, 53.)

Defendant's assertion that advancing any argument would have been futile because the trial court's ruling was clear is without merit. As we have just indicated, the ruling was not clear. Moreover, the evidence was properly excluded based on defendant's counsel's failure to make an adequate offer of proof regarding its relevance or admissibility. (*People v. Blacksher* (2011) 52 Cal.4th 769, 819-820.) The suggestion that the court was aware of the substance, purpose, and relevance of the excluded information because it ruled on the motions in limine is not colorable. (See Evid. Code, § 354, subd. (a).) The motions did not address the admissibility of defendant's friend's testimony regarding what L.N. told her. Thus, they did not absolve defendant of his obligation to make a showing of admissibility as to these statements. Defendant has forfeited any argument on appeal that part of his friend's testimony was erroneously excluded.

3. Alleged Ineffective Assistance of Counsel

Anticipating our forfeiture conclusion, defendant argues his trial counsel rendered ineffective assistance by failing to argue portions of his friend's testimony were improperly excluded.

"In assessing claims of ineffective assistance of trial counsel, we consider whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. [Citations.] A reviewing court will indulge in a presumption that counsel's performance fell within the wide range of professional competence and that counsel's

actions and inactions can be explained as a matter of sound trial strategy. Defendant thus bears the burden of establishing constitutionally inadequate assistance of counsel. [Citations.] If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. [Citation.] Otherwise, the claim is more appropriately raised in a petition for writ of habeas corpus." (*People v. Carter* (2003) 30 Cal.4th 1166, 1211.)

Defendant contends that if his trial counsel had questioned the court's ruling, there is a reasonable probability the court would have reconsidered its ruling, admitted the evidence that L.N. said she wanted to see defendant "rot" in jail, and reached a more favorable verdict. Specifically, he contends his character evidence would have had substantially more weight because the evidence would have provided an explanation for why L.N. would fabricate an allegation by her son.

The record is silent regarding counsel's reasons for not questioning the trial court's ruling. Under these circumstances, where the ruling itself is also unclear, the issue is more appropriately raised in a petition for writ of habeas corpus.

Moreover, defendant has not carried his burden of establishing prejudice. Again, it is reasonable to conclude the trial court did not exclude L.N.'s desire to see defendant punished at all. Additionally, the arguably excluded information only went to the accuracy of an allegation that the court instructed itself was "not evidence that the defendant engaged in any such conduct." The court could "consider these questions and answers only to evaluate the meaning and importance of a character witness's testimony." Some of the character witnesses had heard of the allegation, but none of them said that it did or would change their opinion of defendant. They each indicated the allegation was inconsistent with their observations. Defendant's best friend stated all of the allegations were "baloney," originating from L.N. Outside of the evidence produced

in the context of the motion in limine, the trial court was aware L.N. was defendant's ex-girlfriend and that there were questions about the accuracy of the allegation pertaining to R.N. For instance, defendant's wife testified she babysat R.N.'s child five days a week. This testimony appears to suggest that R.N., notwithstanding his allegations of abuse, allowed his child to have contact with defendant. At sentencing, the trial court noted it found A.D. and D.D. to be "very credible in their statements, in their testimony, and their recounting of the events that occurred." In this context, the likelihood that additional information undermining the R.N. allegation would have persuaded the trier of fact to render a more favorable verdict was minimal. We reject defendant's assertion of ineffective assistance of counsel.

C. Substantial Sexual Conduct Findings as to Counts One and Two

Section 1203.066, subdivision (a)(8) prohibits the granting of probation to a person who, in violating section 288, "has substantial sexual conduct with a victim who is under 14 years of age." Defendant raises two challenges to the findings of substantial sexual conduct as to counts one and two. First, he argues there was insufficient evidence to support the findings. Specifically, he contends that for conduct to constitute substantial sexual conduct by masturbation, the use of a hand is required. He also argues the findings cannot be affirmed because they were not alleged in the accusatory pleading as required by section 1203.066, subdivision (c)(1). We reject both challenges.

1. Sufficiency of the Evidence

Defendant admits the evidence shows he touched A.D.'s genitals with his genitals. Specifically, A.D. testified that when she was six or seven years old, on two separate occasions, defendant took his clothes off, got on top of her, and rubbed her vagina with his penis. " 'Substantial sexual conduct' means penetration of the vagina or rectum of either the victim or the offender by the penis of the other or by any foreign object, oral copulation, *or masturbation of either the victim or the offender*." (§ 1203.066, subd. (b), italics added.) Defendant contends the evidence was insufficient to support the findings

of substantial sexual conduct as to counts one and two because, to constitute masturbation, the touching of genitals must be by hand. There is authority to the contrary. In *People v. Dunn* (2012) 205 Cal.App.4th 1086, the court explained: "Masturbation encompasses any touching or contact, however slight, of the genitals of the victim or the offender done with the intent to arouse the sexual desires of the victim or the offender. [Citations.] Minor's testimony that [the defendant] touched his 'private part' to hers clearly established masturbation . . . ." (*Id*. at p. 1098, fn. 8.) We agree with the court's statement in *Dunn*. Defendant has cited no case law concluding masturbation requires the use of a hand.

According to the Oxford English Dictionary, and as demonstrated by the case law defendant relies on, masturbation *usually* involves contact with a hand. (See Oxford English Dict. (2019) < http://www.oed.com> [as of July 26, 2019] ["The stimulation, usually by hand, of one's genitals for sexual pleasure; the action or practice of masturbating oneself or (less commonly) another person; an instance of this"].) Use of the hand, however, is not required. (*Ibid*.) Other definitions are in accord. (Merriam-Webster Collegiate Dict. (11th ed. 2006) p. 764, col. 2 ["erotic stimulation esp. of one's own genital organs commonly resulting in orgasm and achieved by manual or *other bodily contact* exclusive of sexual intercourse, by instrumental manipulation, occas. by sexual fantasies, or by various combinations of these agencies," italics added]; American Heritage Dict. (5th ed. 2016) p. 1082, col. 1 ["Excitation of one's own or another's genital organs, usually to orgasm, by manual contact *or means other than sexual intercourse*," italics added].) We are not persuaded by defendant's single citation to a contrary definition that the term "masturbation" under section 1203.066, subdivision (b) can be limited as a matter of law to activities involving a hand. (See English Oxford *Living* Dicts. <https://en.oxforddictionaries.com/definition/masturbation> [as of July 26, 2019] ["Stimulation of the genitals with the hand for sexual pleasure"].) We therefore reject his sufficiency of the evidence claim.

2. Accusatory Pleading

As relevant to this proceeding, section 1203.066, subdivision (c)(1) provides: "this section shall only apply if the existence of any fact required in subdivision (a) *is alleged in the accusatory pleading* and is either admitted by the defendant in open court, or found to be true by the trier of fact." (Italics added.)

The complaint deemed an information alleged four counts of committing a lewd and lascivious act on a child under the age of 14 years in violation of section 288, subdivision (a). Counts one and two alleged defendant "did willfully, unlawfully, and lewdly commit a lewd and lascivious act, to wit, penis to genitalia, upon and with the body and certain parts and members thereof of [A.D.], a child under the age of fourteen years . . . with the intent of arousing, appealing to, and gratifying the lust, passions, and sexual desires of the said defendant and the said child." Under count four only, the information states: "It is further alleged that in the commission of the above *offense* the defendant, JOHN MICHAEL SCOTT, is a person who, in violating Section 288 or 288.5 of the Penal Code, has [*sic*] substantial sexual contact with a victim who is under the age of fourteen years old, within the meaning of Penal Code Section 1203.066[, subdivision](a)(8)." (Italics added.) During trial, count four was dismissed after a motion by the prosecution, and the dates in count three were amended by interlineation. After trial, the trial court found defendant engaged in substantial sexual contact during the commission of counts one and two, but not count three.

Defendant argues substantial sexual conduct was not alleged in the accusatory pleading with respect to counts one and two, and thus the true findings as to those allegations cannot be affirmed. The People argue the reference to "the above offense" in the singular was a typographical error. Regardless, we agree with the People that defendant forfeited his claim by consenting to the court's consideration of these allegations. Defendant's assertion that his claim could not be forfeited is incorrect. A claim that an accusatory pleading does not comply with the type of statutory requirement

at issue here can be forfeited. (See *People v. Houston* (2012) 54 Cal.4th 1186, 1229 [defendant forfeited claim that indictment did not comply with requirement in section 664 that it allege the fact that the attempted murder was deliberate and premeditated].) The court instructed itself that, "It is alleged in connection with Counts One through Three that the defendant engaged in substantial sexual conduct during the commission of those crimes on" A.D. and D.D. The verdict forms also reflected this understanding of the applicability of substantial sexual conduct allegations. In reviewing the instructions with the court, counsel for defendant argued that, as we just discussed, the testimony was insufficient to establish masturbation as to counts one and two. No objection was made based on the allegations in the pleading. Defendant was on notice the prosecution was seeking to prove substantial sexual conduct as to counts one and two, and made arguments accordingly. Any assertion on appeal that the accusatory pleading did not plead the facts required under section 1203.066, subdivision (a) has been forfeited.

III. DISPOSITION

The judgment is affirmed.

/S/

RENNER, J.

We concur:

/S/

RAYE, P. J.

/S/

DUARTE, J.